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Nos. 87-1022, 87-1112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE BOARD OF ESTIMATE, *et al.*,
Appellants,

v.

BEVERLY MORRIS, *et al.*,
Appellees.

FRANK V. PONTERIO,
Appellant,

v.

BEVERLY MORRIS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR CITIZENS UNION OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF CITIZENS UNION OF THE CITY OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Citizens Union of the City of New York hereby respectfully moves for

leave to file the attached brief amicus curiae in this case.

Citizens Union is a non-profit, non-partisan membership organization that was founded in 1897 to promote honest and efficient government for New York City and to fight public corruption. Ever since, Citizens Union has been a leader in the struggle to reform and modernize the government of New York City and state policies affecting New York City. Throughout its existence, Citizens Union has worked not only for solutions to urgent immediate problems, but also for fundamental structural change.

Citizens Union has appeared as amicus curiae since the beginning of this case, participating at the District Court level, in the first appeal to the Second Circuit in 1983,

again on remand before the District Court, and in the Second Circuit proceeding from which this appeal was taken. All parties consented to the participation of Citizens Union as amicus curiae before the Second Circuit, and all parties except appellant Ponterio have consented to the filing of this brief.

Citizens Union respectfully submits that it offers this Court a unique perspective on the issues raised herein. Citizens Union is non-partisan, has no political power base to defend, and will gain no political advantage from the outcome of this case.

Citizens Union therefore respectfully requests that this Court grant its motion for leave to file the

attached brief as amicus curiae in this case.

Dated: August 3, 1988

Respectfully submitted,

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STATEMENT OF INTEREST

Citizens Union's interest in this case is set forth in its Motion For Leave to File Brief Amicus Curiae, to which this Court is respectfully referred.

Its interest, simply put, is to assure that the votes of all citizens of New York City count equally. New Yorkers have the right to expect that decisions of the scope and importance of those made by the Board of Estimate will be made by a body that is composed fairly, in compliance with federal constitutional requirements. It is because we remain convinced that the election of members of the Board does not comply with these requirements that Citizens Union seeks to file this brief amicus curiae.

SUMMARY OF ARGUMENT

The New York City Board of Estimate, an elected body with vast powers over budget, land use, franchise and other important issues affecting each of New York City's more than seven million residents, consists of eight members. Three members, the Mayor, Comptroller and President of the City Council are elected on a citywide basis and each has two votes. The other five members, each with one vote to cast, are the Borough Presidents, elected from districts which range in size from 352,121 residents (the borough of Staten Island) to 2,230,936 residents (the borough of Brooklyn). See Morris v. Board of Estimate, 831 F.2d 384, 385 (2d Cir. 1987).

This configuration patently violates the Equal Protection Clause of the United States Constitution. The gross inequality in population among the districts from which representatives with equal votes are elected violates the one person, one vote principle. The apportionment scheme on which the Board is based is not the product of any attempt, much less a good faith attempt, to comply with substantial voter equality as required by law. Rather, it is the vestige of a turn of the century political arrangement. No state interests can excuse or justify such a clear violation of the Fourteenth Amendment one person, one vote requirement. As the courts below so correctly noted, the state interests put forward by appellants could well

be accommodated in a constitutionally acceptable manner.

The courts below did not seek to impose federal solutions on local government, or interfere with innovative or flexible approaches to governmental design. The courts below simply recognized the obvious: that the disparity in borough population is enormous, and therefore the representational scheme of the Board of Estimate is patently unconstitutional. The Court of Appeals noted that revision of the New York City Charter was already underway, and suggested only temporal guidelines, leaving substance to the local level.

The Board of Estimate exercises a wide range of governmental powers, as cogently set out by the Second Circuit. Morris v. Board of Estimate,

supra, 831 F.2d at 385. As an elected body with general governmental powers, the Board must be structured to comply with the one person, one vote rule. To be constitutionally valid, a state or local apportionment plan must in the first instance and as a driving force be based on population, not geography or other factors.

The Board does not meet this fundamental requirement. The geography driven structure of the Board has remained unchanged since 1901. Rather than be subject to reapportionment periodically, based on changes in population in the districts (boroughs) whose representatives (Borough Presidents) sit on the Board, the number of representatives and the districts which they represent have

not varied for nearly 90 years[1]. This makes the true colors of the Board of Estimate stand out in vivid hue. It is an anachronism, not an innovative institution of "regional" government. In fact, it is not "regional" at all. It is an arm of city government, with many of the powers which other cities vest either in the executive or in the city council, board of supervisors, or the like.

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1 To the extent that the voting scheme of the Board has been changed over the years, the changes have exacerbated, rather than diminished, the constitutional problems. Originally the Borough Presidents of Manhattan and Brooklyn (then the two largest boroughs) had two votes apiece. The citywide members each had three votes, and the other Borough Presidents each had one. In 1958 this was changed to give the citywide members four votes each and each of the Borough Presidents two votes apiece. In 1978 the citywide members were given two votes and each of the Borough Presidents one vote.

The monumental population disparity among the boroughs (Brooklyn's population, 2,230,936, is 6.33 times greater than Staten Island's 352,121) presents the appellants with an insurmountable obstacle. They attempt to divert this Court's attention from this fundamental constitutional infirmity by arguing that the courts below ignored the three citywide members of the Board and determined the issue as if the Board contained only the Borough Presidents. Brief for Municipal Appellants and Appellant Straniere at 31.

Of course, the courts below did not ignore the presence of the citywide members on the Board. In its first decision, the Second Circuit specifically directed the District Court to consider what role, if any,

consideration of the presence of the citywide members should play in assessing the representational disparities on the Board. The District Court carefully considered this issue. Its measurement of the malapportionment of the Board was affirmed by the Second Circuit, the court which had directed the District Court's attention to the impact of the citywide members in the first place.

The courts below correctly held that the citywide members should not be included in the methodology that determined the deviation from equality among the boroughs. They recognized that not only was there substantial precedent to exclude the at-large seats as a factor in measuring the Board's apportionment, but that there were also sound reasons based on the very different interests

to be represented on the Board by the citywide members as opposed to the Borough Presidents. The citywide members represent citywide interests on the Board. The Borough Presidents are supposed to be the representatives of the interests of their respective boroughs. The courts below concluded that excluding the citywide members from any measurement of the Board's malapportionment conforms to the relationship that those representatives have with their electorates[2]. In no sense, then, can the franchise rights of borough citizens in electing citywide officials be deemed to compensate for inter-borough representational

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[2] Of course, each of the three citywide officials has responsibilities unique to his or her office. Thus, each official may approach certain Board of Estimate votes from a different perspective.

malapportionment. The effect of the presence of citywide officials on the Board of Estimate is entirely neutral as to the gross disparities in the voting rights of borough citizens. Consequently, the measurement focused on where the inequalities were -- among the boroughs.

Faced with the enormous 132.9% deviation from equality that exists with regard to the ability of residents of different boroughs to impact the election of their Borough Presidents, appellants have instead urged this Court to apply an outcome determinative analysis based on the Banzhaf Index. The appellants' Banzhaf analysis, however, is based on a hypothetical construct properly rejected by the courts below to which this Court should not give credence.

Nor is appellants' romanticized and inaccurate description of the Board of Estimate as an innovative, flexible experiment in regional government more availing. Even if it were true, it is irrelevant and cannot cure the Board's unconstitutional structure. The one person, one vote rule is not rigid and does not prohibit minor deviations from substantial voter equality to achieve compelling local interests. The Board of Estimate violates this constitutional mandate, however, because the deviations are enormous and there has been no attempt to achieve the state interests asserted in a constitutionally acceptable manner. The record conclusively demonstrates that such state interests could be achieved constitutionally.

Accidents of geography and choices of long forgotten boundary makers have no place in determining voting apportionment plans[3]. In fact, the subtle theme running through the submissions of appellants and the amici supporting their position is that the chief state interest in maintaining the scheme is a blatantly impermissible one -- the opportunity for residents of a discrete geographical area to have a vast, disproportionate impact on the lives of their fellow citizens. This is not

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3 Appellants' ardor carries them a little too far when they profess their fealty to nature. It was not nature, or the Almighty, that skipped across the Harlem River and made Marble Hill, located on the continental United States and contiguous with the Bronx, part of Manhattan. See Bird and Carroll, New York City By Day, N.Y. Times, July 5, 1984, at B4, col. 5. Nor is there a river, or any other natural boundary, separating Brooklyn and Queens.

flexibility. This is not innovation. This is a pure and simple violation of the rights guaranteed by the Equal Protection Clause.

ARGUMENT

THE COURTS BELOW PROPERLY FOUND THAT THE BOARD OF ESTIMATE IS SEVERELY MAL-APPORTIONED AND IN VIOLATION OF THE EQUAL PROTECTION CLAUSE'S GUARANTEE OF SUBSTANTIAL VOTER EQUALITY.

A. The Present Representational Structure Of The Board Of Estimate Violates The Requirement That Governmental Bodies Be Constructed As Nearly As Practicable To Reflect Voter Equality.

This Court has consistently maintained that in formulating representational plans and in creating districts for congressional, state and municipal government elections "the

overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen." Reynolds v. Sims, 377 U.S. 533, 579 (1964). This Court has made it clear that any local governance plan based on elected, representational government must be designed and implemented with the Equal Protection guarantees as its basic premise. To be constitutionally valid, a state or local apportionment plan must be founded on considerations of population, and not geography.

> [T]he basic principle of representative government remains, and must remain, unchanged -- the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative

apportionment controversies. Reynolds v. Sims, supra, 377 U.S. at 567 (emphasis supplied).

This Court has specifically rejected attempts to insulate local governmental bodies from the standard of substantial voter equality, finding "little difference, in terms of the application of the Equal Protection Clause and of the principles of Reynolds v. Sims, between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns and counties." Avery v. Midland County, 390 U.S. 474, 481 (1968). See also Hadley v. Junior College District, 397 U.S. 50, 56 (1970) ("[W]henever a state or local government decides to select persons by popular election to perform government functions, the Equal Protection Clause of the Fourteenth

Amendment requires that each qualified voter must be given an equal opportunity to participate in the election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as it is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials."); Abate v. Mundt, 403 U.S. 182, 185 (1971) ("It is well established that electoral apportionment must be based on the general principle of population equality and that this principle applies to state and local elections.")

Applying these principles to the facts of this case, the District Court below quite correctly held that the Fourteenth Amendment directs that:

> [A]ny citizen shall have a vote equal to any other citizen -- no matter the borough of either.
>
> * * *
>
> It is a citizen's right -- not a borough's -- which is the equal protection center of attention.

Morris v. Board of Estimate, 647 F.Supp. 1463, 1470 (E.D.N.Y. 1986).

The record and the briefs of appellants and amici supporting them can be searched diligently without finding a single claim that this crucial "starting point" and "controlling criterion" was even considered in devising the Board of Estimate and its electoral configuration. As even appellants must admit, for it is incontrovertibly the case, the New York City Board of Estimate is the vestige of a 1901 political arrangement having nothing to do with

population, executed long before modern principles of "one person, one vote" were expounded.

There is nothing necessarily sinister in the fact that the Board was set up this way nearly ninety years ago. It is wrong to suggest, however, that this historical anachronism has any place in a government that must meet today's constitutional principles.

Not surprisingly, every federal court, including the two below, that has considered the population disparities among New York City's boroughs has found them so great that allocating equal representation to each borough violates the Equal Protection Clause. Morris v. Board of Estimate, 647 F.Supp. 1463 (E.D.N.Y. 1986); Morris v. Board of Estimate, 831 F.2d 384 (2d Cir. 1987); Oliver v.

Board of Education, 306 F.Supp. 1286 (S.D.N.Y. 1969) (invalidating statute constituting City's permanent board of education); Andrews v. Koch, 528 F.Supp. 246 (E.D.N.Y. 1981), aff'd., 688 F.2d 815 (2d Cir. 1982), aff'd. sub. nom. Giacobbe v. Andrews, 459 U.S. 801 (1982) (invalidating election plan for the New York City Council).

Thus this Court could, with no further consideration, reject the current configuration of the Board of Estimate on the sole ground that the Board was not apportioned with population as the "starting point" and "controlling criterion" or even, for that matter, as a factor at all. Even if this Court is not content to do so, however, the plan must fail no matter what other factors are considered.

The Board of Estimate, under New York City's Charter as it is presently

formulated, wields vast power over city government and the lives of each of New York's over 7,000,000 citizens. The Second Circuit recognized this in its opinion below:

> [T]he City of New York ... is to a substantial extent governed by the Board of Estimate.

Morris v. Board of Estimate, supra, 831 F.2d at 385.

The Board combines many duties normally held by the executive or the legislature of a government. The fact that the Board of Estimate does not have all the powers of both the executive and legislative branches of government in no way insulates it from the proscriptions of the one person, one vote rule.

> [W]henever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the

> Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election.

Hadley v. Junior College District, supra, 397 U.S. at 56.

The appellants seek to evade the requirement of substantial voter equality by attempting to minimize the importance of the Board. Appellants speak of the "limited" functions the Board exercises over "extremely local matters." See Brief for Municipal Appellants and Appellant Straniere, at 9-10. See also Jurisdictional Statement of Municipal Appellants and Appellant Straniere at i,5,6. These claims are, as has been demonstrated, unsupported by the evidence as recognized and approved by the courts below. By denigrating the stature of the Board, the appellants hope this

Court will cast a lenient eye over the City's obvious failure to comply with this Court's requirement in Avery and Hadley that local elective bodies have as their underpinning a representational structure based on substantial voter equality.

B. The Gross Deviation From Equality Found Below Was Clearly Correct.

The Borough President of Brooklyn, representing 2,230,936 citizens of the City of New York, and the Borough President of Staten Island, representing 352,121, have the same number of votes -- one -- on the Board of Estimate. See Morris v. Board of Estimate, supra, 831 F.2d at 385. Applying the Abate test, the courts below added the largest deviation above equality, +75.2%, to

the largest deviation below equality, -57.7%, to arrive at a maximum deviation from equality of 132.9%. Id. at 386. There can be no dispute that such a deviation is intolerable, far in excess of anything that this Court has ever allowed.

It is the electoral power of each citizen of the governmental unit in question (here New York City) that this Court has held is the proper basis of analysis. Recognizing this, the Second Circuit held below, and Citizens Union agrees, that:

> [T]he proper inquiry in cases such as this is into the relative power of voters to elect representatives.

Morris v. Board of Estimate, supra, 831 F. 2d at 389. On the basis of this type of analysis, there can be little argument that the individual Staten Island voter has a far greater

power to elect his representative than any other citizen of New York -- more than six times as much power as a New Yorker who resides in Brooklyn.

Realizing that they must fail if this Court retains this "power to elect" analysis, appellants instead urge this Court to turn their backs on the established precedent. They argue that it is not a voter's ability to elect a representative, but rather his theoretical ability to effect the outcome of a particular vote of the Board itself that really matters. Thus, they contend that the at-large votes of citywide members on the Board should be factored into the malapportionment computation using the Banzhaf Index. Citizens Union believes that engaging in such outcome analysis completely ignores the realities of the political process.

See Morris v. Board of Estimate, supra, 831 F.2d at 389-91, citing Whitcomb v. Chavis, 403 U.S. 124 (1971).

Far from ignoring the relevance of the at-large votes to the Board's representational structure, as appellants suggest, the courts below rigorously examined the relevance of at-large voting to the Board's malapportionment. Both courts carefully examined appellants' claim that the equal ability of all New York citizens to elect the at-large members compensates for representational disparities at the level of borough representation, and properly rejected it. Recognizing that "it is undoubtedly the case that a representative will seek especially to advance the interests of those whose votes elect him or her," Morris v.

Board of Estimate, supra, 831 F.2d at 392, the Court of Appeals, affirming the conclusion of the District Court, found that the citywide and borough representatives serve different constituencies requiring separate treatment for purposes of apportionment analysis.

> [T]he Board's members primarily represent the interests of the different constituencies that elect them. The Borough Presidents sit on the Board of Estimate as representatives of the special concerns their constituents have qua residents of a particular borough. The citywide members, on the other hand, must be supposed to transcend such purely local interests of their constituents qua residents of New York City.

Id.

Judge Newman, in his concurrence, did suggest that at some point the voting power of at-large members compared to that of district members

could be relevant and even decisive on the issue of constitutionally valid apportionment. He made clear, however, that this was not such a case:

> In our case, I agree that at-large voting power of six out of eleven on most issues and four out of nine on budget issues is not sufficient to permit us to ignore the substantial aggregate deviation of the five boroughs that each send one representative to the New York City Board of Estimate.

Morris v. Board of Estimate, supra, 831 F.2d at 395.

There are a number of reasons why this Court should re-affirm its earlier holdings and reject outcome determinative analysis and the Banzhaf Index, particularly. This Court has already recognized the limitations of the Banzhaf analysis, stating that it is "theoretical" and fails to consider

> any political or other factors which might affect the actual voting power of the residents, which might include party affiliation, race, previous voting characteristics or any other factors which go into the entire political voting situation.

Whitcomb v. Chavis, 403 U.S. 124, 145-146 (1971).

Applying this analysis to the Board of Estimate, the Second Circuit correctly stated:

> It [the Banzhaf Index] is unrealistic in a general sense involving voter motivation; and it is unrealistic in a particular sense as it applies to citizen voting power through the Board of Estimate.

Morris v. Board of Estimate, supra, 831 F.2d at 390.

First, it includes in its methodology the presence of the citywide members, which, as just discussed, the courts below properly

rejected. Second, it attempts to allocate the citywide members' votes to the voters of the various boroughs by means of a purely theoretical and unrealistic formula.[4] The appellants state in their brief that there are "552 possible voting combinations in which any one member can affect the outcome of a vote," Brief for Municipal Appellants and Appellant Straniere at 35, and that these "combinations" must all be factored into their Banzhaf analysis. Each of these "combinations" is given the same weight and possibility of occurrence as any other.

Inconsistently, appellants assert that one of the Board of Estimate's

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[4] Complicated mathematical formulas do not in and of themselves reflect a sophisticated insight. They often, as here, confuse and overly complicate a simple issue.

great strengths, and a prime example of the efficiency which they assert justifies the denial of constitutional rights to the majority of New York City's residents, is its "collegiality." This "collegiality," according to the appellants, is epitomized by the tradition of borough president deference. Under this policy, each Borough President often controls the votes of all five Borough Presidents on issues of local importance. Thus, because the Mayor cannot vote on budget issues, the Borough President of Staten Island, representing only 352,121 of New York's more than 7,000,000 residents, has the power to control certain City budget items completely by himself. Morris v. Board of Estimate, supra, 831 F.2d at 391. Even on non-budget matters, borough president deference

means that all five of the Borough Presidents vote alike on many matters. Thus, as found by the Second Circuit, the "552 possible voting combinations" posited by appellants is purely theoretical, and afford no basis for any kind of analysis of voter equality for the New York Board of Estimate. Morris v. Board of Estimate, supra, 831 F.2d at 390-391.

Even supposing that the alternative methodology was otherwise flawless, the resulting deviation even under the Banzhaf analysis would still be 31% (See Morris v. Board of Estimate, supra, 831 F.2d at 387 fn. 2), well in excess of the 16.4% that this Court suggested might be the outer limit of permissible deviation. Mahan v. Howell, 410 U.S. 315, 329 (1973).

C. No Legitimate State Interest Exists To Justify The Current Structure Of The Board Of Estimate.

No legitimate state policy requires that this Court ignore the gross inequality that exists on the New York City Board of Estimate. Indeed, the Board is terribly flawed, and would be properly subject to change on policy grounds regardless of its constitutional infirmities.

Appellants offer several alleged state interests which they claim should override the constitutional rights of New York's citizens. Their main themes, which run throughout their brief, are that New York City is actually a "region" and that good government requires that the Board of Estimate be maintained in its present form. Neither premise is true.

New York City, although large, is a municipality, not a region. All its citizens pay taxes at the same rates, wherever they live. All are protected by the same police and fire departments. Decisions made by the Board affect all citizens equally. The decision to locate a new firehouse in Staten Island may seem at first blush like a local issue, but it means that the City has elected to spend some of its limited resources there, and thus not somewhere else. The cost of construction is borne as equally by citizens of the Bronx, miles from the new firehouse, as the residents of Staten Island.

As for the appellants' romanticized description of the Board, it is for the most part unencumbered by references to the record. Further, Citizens Union by no means concedes

that the Board's effectiveness can be taken for granted. The Board of Estimate has had its successes; it has also had its failures, as those who read the daily press have been only too acutely aware in recent months.

To the extent the City believes effective government in New York requires some blending of citywide and borough representation, that is not threatened by this litigation.[5] The City may constitutionally create a system of government which combines citywide and borough representatives and still provide for substantial voter equality at the level of borough representation. If this Court affirms

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[5] In the Brief for Municipal Appellants and Appellant Straniere, at 23, appellants incorrectly assert that "the courts below found that the Board's blending of citywide and local representation is inconsistent with the principle of one person, one vote."

the decisions below, the City can, if it feels it necessary, continue to recognize geographic/political subdivisions, but in a constitutional way. There is only one aspect of New York government which is, in fact, threatened by a ruling that the Board is unconstitutionally configured, namely, an attempt to promote borough interests equally, at the expense of citizen interests.[6]

The appellants have argued that in order to preserve "meaningful participation" by Staten Island as a borough in the Board's decisions, it is necessary to grant Staten Island's representative the same voting power as the representative of each of its

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[6] The City, of course, "bear(s) the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." Karcher v. Daggett, 462 U.S. 725, 731 (1983).

much more populous neighbors, so that Staten Island will not become a "bystander" in city government. But Staten Island has no rights under the Constitution. Its residents do -- but no more or less than their neighbors in other boroughs. This Court made it clear in Reynolds v. Sims that "[l]egislators represent people, not trees or acres." 377 U.S. at 562. The Second Circuit recognized this, stating, "the Equal Protection clause requires the equalization of voter representation, not interest representation." Morris v. Board of Estimate, supra, 831 F.2d at 392. As this Court observed:

> [P]ermitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population...Such a

> result, we conclude, would be constitutionally impermissible.

Reynolds v. Sims, supra, 377 U.S. at 581.

That the result of reapportioning the Board's representational structure would diminish the power of smaller boroughs -- qua borough -- is, as the Second Circuit properly acknowledged, a fact of democratic life: "the fact that a minority may regularly be overshadowed by its more populous neighbors under a proportional voting scheme is one characteristic of a representative democracy." Morris v. Board of Estimate, 707 F.2d 686, 691 (2d Cir. 1983).

Similarly, appellants' invocation of the need for "innovation" and "flexibility" in structuring municipal government is disingenuous. First, as noted, Citizens Union believes the

very existence of the Board -- and of its members' desire to maintain power -- stifles innovation. Moreover, as this Court noted:

> [T]he Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government...Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population.

Avery v. Midland County, supra, 390 U.S. at 485-86. As properly noted by the Second Circuit, "[s]o long as the requirements of the Equal Protection Clause are met, each locality is free to develop the system of governance which best accords with its needs."

Morris v. Board of Estimate, supra, 707 F.2d at 691.

Finally, to the extent that appellants' position depends on a perception by this Court that the Board of Estimate is a miracle of local governance that deserves not to be tinkered with, that position must fail. The Board is hardly the fair and efficient institution the appellants seek to portray. The Board is subject to criticism in terms of its institutional efficiency, for with a mere eight members it must attempt to cope with the hundreds of items regularly on its docket. (JA54-190.) The Board is also subject to criticism for being undemocratic and unresponsive, conducting its business in secret sessions which frustrate public participation in the decisionmaking process. See Farr,

Liebman and Wood, Decentralizing City Government at 16-17. The Board's structure has also been criticized for failing to serve the interests of minorities in New York City. As the affidavits of Herman Badillo (JA240), Wendell Foster (JA248), and Edward Sadowsky (JA251) indicate, the individual boroughs of New York City are comprised of numerous discrete neighborhoods of different racial, economic and political elements. Former Borough President Badillo made it clear:

> [E]ach borough is so heterogeneous with respect to economic, religious, racial and ethnic disparities that neighborhoods which lie within each borough have dramatically opposed interests. Under the present scheme local interests are no longer effectively represented.

(JA242.)

It does not particularly lie within this Court's purview to decide whether the Board of Estimate is, overall, a "good" or "bad" institution of city government. The Board is neither a wonderfully efficient nor particularly democratic body.

Even if the Board did perform well, however, "the Constitution does not permit a State to relegate considerations of equality to secondary status and reserve as the primary goal of apportionment the service of some other state interest." Mahan v. Howell, supra, 410 U.S. at 340.

This Court need not, however, choose principle over practicality. Innovation is not inconsistent with the Constitution. New York City may constitutionally blend citywide and borough representation if it feels it

necessary, without overriding the constitutional requirement of substantial voter equality. It may not do one thing -- grant the voters of certain geographic subdivisions substantially greater voting power than that of voters from other geographic subdivisions. In fact, a ruling from this Court that the present Board of Estimate is impermissibly configured will require innovation, allowing the Charter Revision Commission, a body already in place and functioning, to craft a system compatible both with the Constitution and the needs of New York City as it approaches the twenty-first century.

CONCLUSION

For the reasons stated above the decision of the Second Circuit should be affirmed.

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Respectfully submitted,

/s/John V. Lindsay

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